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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

RODNEY D. ENGLERT,
Plaintiff,

Civil No. 05-1863-AA
OPINION AND ORDER

vs.

HERBERT LEON MACDONELL, TERRY
L. LABER, BARTON P. EPSTEIN,
PETER R. DE FOREST, STUART H.
JAMES, and PATRICIA LOUGH,

Defendants.

Victor Calzaretta
Attorney at Law
621 S.W. Morrison St., Suite 440
Portland, OR 97205
Attorney for plaintiff

Eric Neiman
Williams Kastner & Gibbs, PLLC
888 S.W. Fifth Ave., Suite 600
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Attorney for Herbert Leon
MacDonell

Charles F. Hinkle
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900 S.W. Fifth Ave., Suite 2600
Portland, OR 97204
Attorney for defendants Terry
L. Laber, Barton P. Epstein,
Peter R. De Forest, Stuart H.
James, and Patricia Lough

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1 AIKEN, Judge:

2 Plaintiff and defendants Laber, Epstein, De Forest, James
3 and Lough have filed motions for attorney fees.

4 BACKGROUND

5 Plaintiff Rodney D. Englert filed a complaint for
6 defamation and libel against Herbert Leon MacDonell, Terry L.
7 Laber, Barton P. Epstein, Peter R. De Forest, Stuart H. James,
8 and Patricia Lough in Multnomah County Circuit Court.
9 Defendants Laber, Epstein, De Forest, James and Lough
10 (hereinafter "the Laber defendants") filed for removal to U.S.
11 District Court based on diversity, and later filed a special
12 motion to strike based on Oregon's "Anti-SLAPP" (strategic
13 litigation against public participation) law, O.R.S. §§ 31.150-
14 31.155. Defendant MacDonell filed a motion to dismiss for lack
15 of personal jurisdiction and in the alternative an Anti-SLAPP
16 motion to strike.

17 MacDonnell's motions to dismiss for lack of personal
18 jurisdiction and alternative special motion to strike were
19 denied. The defendants' special motions to strike were granted
20 in part and denied in part as follows: defendants Laber and
21 DeForest's motions were granted, and on May 7, 2009, a judgment
22 was entered dismissing plaintiff's claims against Laber and
23 DeForest. Defendants Epstein, Lough and James's motions were
24 granted as to their communications to three professional
25 organizations (the American Academy of Forensic Sciences, the
26 FBI's Scientific Working Group on Bloodstain Pattern Analysis,
27 and the International Association of Blood Pattern Analysis),
28 and denied as to three personal communications made by Epstein,

1 Lough and James.

2 STANDARDS

3 1. Oregon State Law

4 Oregon Revised Statute 31.152(3) states: "[a] defendant
5 who prevails on a special motion to strike made under ORS
6 31.150 shall be awarded reasonable attorney fees and costs. If
7 the court finds that a special motion to strike is frivolous or
8 is solely intended to cause unnecessary delay, the court shall
9 award costs and reasonable attorney fees to a plaintiff who
10 prevails on a special motion to strike."

11 2. Attorney Fees

12 Under Oregon law, an attorney fee award is to be
13 determined by considering the factors listed in Or. Rev. Stat.
14 20.075(1) and (2). Elston v. Toma, 2005 WL 696900 at *1-2 (D.
15 Or. 2005).

16 A. Or. Rev. Stat. 20.075(1)

17 Those factors are as follows: (a) the conduct of the
18 parties in the transactions or occurrences that gave rise to
19 the litigation; (b) the objective reasonableness of the claims
20 and defenses asserted by the parties; (c) the extent to which
21 the award of an attorney fee in the case would deter others
22 from asserting good faith claims or defenses in similar cases;
23 (d) the extent to which an award of an attorney fee in the case
24 would deter others from asserting meritless claims and
25 defenses; (e) the objective reasonableness of the parties and
26 the diligence of the parties and their attorneys during the
27 proceedings; (f) the objective reasonableness of the parties
28 and the diligence of the parties in pursuing settlement of the

1 dispute; (g) the amount that the court has awarded as a
2 prevailing party fee under ORS 20.190; and (h) such other
3 factors as the court may consider appropriate under the
4 circumstances of the case.

5 B. Or. Rev. Stat. 20.075(2)

6 Those factors are as follows: (a) time and labor required
7 in the proceeding, novelty and difficulty of the questions
8 involved in the proceeding and the skill needed to properly
9 perform the legal services; (b) the likelihood, if apparent to
10 the client, that the acceptance of the particular employment by
11 the attorney would preclude the attorney from taking other
12 cases; (c) the fee customarily charged in the locality for
13 similar legal services; (d) the amount involved in the
14 controversy and the results obtained; (e) the time limitations
15 imposed by the client or the circumstances of the case; (f) the
16 nature and length of the attorney's professional relationship
17 with the client; (g) the experience, reputation and ability of
18 the attorney performing the services; and (h) whether the fee
19 of the attorney is fixed or contingent.

20 DISCUSSION

21 1. Plaintiff's Motion for Attorney Fees

22 Plaintiff moves for attorney fees in the amount of
23 \$59,097.00. That motion is denied. The attorney fee provision
24 quoted above is clear that under the first sentence, if a
25 defendant's anti-SLAPP motion is granted, the court "shall"
26 award attorney fees to the defendant; conversely, pursuant to
27 the second sentence of the statute, if a defendant's motion is
28 denied, a plaintiff is not automatically entitled to attorney

1 fees. Instead, plaintiff must show that defendant's motion to
2 strike was "frivolous or solely intended to cause unnecessary
3 delay[.]" ORS 31.152(3). In construing a virtually identical
4 attorney fee provision in California's SLAPP statute, the
5 California Court of Appeals held that the provision, "evidences
6 a legislative intent to do more than make fees and costs
7 equally available to both sides. Instead, the statute reflects
8 a clear preference for awarding fees and costs to prevailing
9 defendants." ComputerXpress, Inc. v. Jackson, 113 Cal.Rptr.2d
10 625, 647 (Cal. App. 2001).

11 Plaintiff first asserts that defendants' SLAPP motion was
12 "intended to cause unnecessary delay." However, plaintiff
13 fails to provide any evidence whatsoever in support of that
14 assertion. Moreover, the fact that defendants' motion was
15 granted in part is evidence that the motion was legally
16 justified. Plaintiff next contends that defendants' motion was
17 "frivolous," arguing that the fact that this court denied in
18 part the motion filed by defendants Epstein, Lough and James is
19 evidence of that contention. I disagree. Defendants' motion
20 was actually granted in part as to their submissions to the
21 three professional organizations, and denied only as to the
22 three "independent" communications. Therefore, at least 50% of
23 defendants' anti-SLAPP motion was granted, and therefore cannot
24 be considered "frivolous." See ComputerXpress, Inc., 113
25 Cal.Rptr.2d at 649 ("[d]efendants . . . are entitled to
26 recover attorney fees and costs incurred in moving to strike
27 the claims on which they prevailed, but not fees and costs
28 incurred in moving to strike the remaining claims"); New.Net.

1 Inc. v. Lavasoft, 356 F.Supp.2d 1090, 1115 (C.D. Cal.
2 2004) ("[a]n award [of attorney fees to the defendant] is proper
3 even if the anti-SLAPP motion is granted as to only some of a
4 plaintiff's claims."). Finally, the court has not found any
5 cases, nor has the plaintiff provided any, where a court has
6 partially granted a defendant's anti-SLAPP motion and then
7 awarded attorney fees to the plaintiff.

8 2. Defendants' Motion for Attorney Fees

9 Dismissed defendants Laber and DeForest move for attorney
10 fees in the amount of \$12,609.30 each. Defendants Epstein,
11 James and Lough move for attorney fees in the amount of
12 \$6,304.65 each. Defendants Laber and DeForest prevailed on
13 their anti-SLAPP motion in its entirety. Defendants Epstein,
14 James and Lough prevailed on approximately 50% of their anti-
15 SLAPP motion in that they prevailed with regard to their
16 communications to the three professional organizations and did
17 not prevail regarding their three "independent" communications
18 (a copy of the ethics complaint that James allegedly sent to
19 Philip Thornton, a lawyer in Tacoma, Washington; a letter that
20 Lough sent to the San Diego District Attorney's office; and a
21 letter dated September 1, 2004, that Epstein sent to Brett
22 Hartmann, an inmate in an Ohio prison).

23 The defendants were represented jointly by the same
24 attorneys throughout the district court proceedings on their
25 anti-SLAPP motion. The fees charged by defendants' lawyers for
26 these proceedings were paid by the five defendants on an equal
27 basis, that is, one-fifth of the total bill was charged to each
28 defendant, and paid by each defendant. As noted in this

1 court's Opinion of May 10, 2006, Oregon's anti-SLAPP statute
2 was "modeled after California's [anti-SLAPP] statute." Opinion,
3 p. 14. As stated earlier, defendants are entitled to recover
4 fees and costs incurred in moving to strike the claims on which
5 they prevail, but not those fees and costs incurred in moving
6 to strike the remaining claims. ComputerXpress, Inc., 113
7 Cal.Rptr.2d at 647.

8 Defendants Laber and DeForest prevailed on their motions
9 in its entirety, therefore, by statute, they are entitled to
10 full reimbursement for their portion of attorney fees
11 attributable to the anti-SLAPP motion. Further, the remaining
12 three defendant prevailed on at least 50% of their anti-SLAPP
13 motion when this court granted that motion regarding
14 communications made to three professional organizations,
15 denying the motion only as to three independent communications
16 made by defendants.

17 First, in applying Or. Rev. Stat. 20.075(1), I find two of
18 the factors relevant. Considering 20.075(1)(b), I find it was
19 not "objectively reasonable" for plaintiff to name defendants
20 Laber and DeForest in this lawsuit. As this court stated in
21 its prior Opinion, there was "no evidence . . . that defendants
22 DeForest and Laber participated in any speech against plaintiff
23 outside of the ethics complaints." Opinion, p. 25. Plaintiff
24 had no evidence that defendants Laber and DeForest defamed him.
25 Second, considering 20.075(1)(d), the imposition of attorney
26 fees would work to deter others from asserting meritless
27 claims. The purpose of the statute, 31.150(3), is "to allow
28 early dismissal of meritless first amendment cases aimed at

1 chilling expression through costly, time-consuming litigation."
2 Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1109 (9th Cir.
3 2003).

4 Next, I will consider the application of Or. Rev. Stat.
5 20.075(2) discussing only the factors that contribute to the
6 decision. First, regarding the amount of time, novelty and
7 difficulty of issues, when evaluating an anti-SLAPP motion, the
8 court must evaluate all of the evidence in the record because
9 an anti-SLAPP motion tests the sufficiency of the evidence on
10 the merits. This standard requires defendant to establish
11 that the plaintiff's claims arise out of conduct "in
12 furtherance of the exercise of the constitutional right . . .
13 of free speech in connection with a public issue or an issue of
14 public interest," and the plaintiff to "present substantial
15 evidence to support a prima facie case." Or. Rev. Stat.
16 31.150(1), (2) (d). When filing an anti-SLAPP motion, the
17 defendant must present the legal and factual basis for all of
18 their defenses. Further, at the time the court decided this
19 motion, there were no reported appellate decisions in state or
20 federal court applying Oregon's anti-SLAPP statute, supporting
21 defendants' contention of the novelty and difficulty of the
22 issues.

23 Defense counsel worked on this case between November 28,
24 2005, and May 22, 2006. Three lawyers worked on the anti-SLAPP
25 motions - 178.5 hours (Hinkle), 12.7 hours (Mullen), and 16.5
26 hours (Edling). The defendants are seeking fees for 166.3
27 hours of Hinkle's time, 1.8 hours of Mullin's time, and none of
28 Edling's time. The value of those hours, at their regular

1 billing rates, is \$63,046.50. Each of the five defendants paid
2 one-fifth of that amount, or \$12,609.30. Because Laber and
3 DeForest prevailed on their anti-SLAPP motion in its entirety,
4 they request a total fee reimbursement, or \$12,609.30 each in
5 attorney fees. Defendants Epstein, James and Lough prevailed
6 on at least 50% of their anti-SLAPP motion so they request a
7 50% fee award, or \$6,304.65 each (half of the one-fifth payment
8 amount, \$12,609.30). Defendants request a total fee award of
9 \$44,132.55.

10 Regarding fees customarily charged in the locality,
11 defendants seek an award for Hinkle's time at the rate of \$360
12 per hour for his time in November 2005, and at the rate of \$375
13 per hour for his time between December 1, 2005 and May 24, 2006
14 (the date the fee petition was filed); for Mullin's time at the
15 rate of \$385 per hour for his time in November 2005, and at the
16 rate of \$400 per hour for his time between December 1, 2005 and
17 May 24, 2006. I find these hourly rates are reasonable. See
18 Summit Properties v. New Technology Elec. Contractors, 2005 WL
19 2104960 (D. Or. 2005) (CV 03-748-HA) (attorney fees awarded at
20 the requested hourly rates of \$385 for work performed in 2005
21 for attorney Mullin); Second Wind v. Leer, 2005 WL 1502887 (D.
22 Or. 2005) (CV 04-214-AA) (attorney fees awarded at the hourly
23 rate of \$350 for work performed by Jere Webb and at the hourly
24 rate of \$300 for Stephen Redshaw); Lanphere Enterprises v.
25 Jiffy Lube International, CV 01-1168-BR (attorney fees at an
26 hourly rate of \$325 for Stoel Rives partners for work performed
27 in 2002); and Stacy v. KOIN-TV, et al., Mult. County Circuit
28 Court No. 0506-05987 (attorney fees awarded to Hinkle pursuant

1 to anti-SLAPP statute at hourly rate of \$375 in 2006).

2 Regarding the amount in controversy and the results
3 obtained, plaintiff requests damages in the amount of \$3
4 million in his amended complaint. Because defendants Laber and
5 DeForest prevailed on their motion to strike, plaintiff will
6 recover nothing from them. Further, with respect to defendants
7 Epstein, James and Lough, because they prevailed on 50% of
8 their motion to strike, any damages ultimately recovered by
9 plaintiff will be reduced. Finally, defense counsel notes that
10 their billings have been on an hourly basis instead of a
11 contingent fee arrangement.

12 Therefore, based on the factors outlined above and a
13 careful review of the billing records submitted by defendants
14 to support their fee entitlement, I find that defendants are
15 entitled to the following attorney fees:

16 Laber - \$12,609.30 (full attorney fee recovery)

17 DeForest - \$12,609.30 (full attorney fee recovery)

18 Epstein - \$6,304.65 (50% attorney fee recovery)

19 James - \$6,304.65 (50% attorney fee recovery)

20 Lough - \$6,304.65 (50% attorney fee recovery)

21 For a total attorney fee award in the amount of \$44,132.55.

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